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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 793

Case No. 878: BLOCH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 9 October 1995, Leonce R. Bloch, a former staff member of the United Nations, filed an application, requesting the Tribunal, inter alia:

"...

(i) To hold that the investigation of the Applicant and his suspension ... was precipitous and totally unwarranted ...

(ii) To hold that the investigation of the Applicant and the harsh measures of suspension inflicted on him were motivated by extraneous factors ...

(iii) To hold that the suspension of the Applicant was totally arbitrary and was not based on valid evidence of corruption but rather on a tenuous presumption of guilt and the very unreasonable premise of conspiracy and collusion ...

(iv) To hold that the harsh and unreasonable measures accompanying the implementation of the suspension were totally unjustified and have led to irreparable damage to the personal and professional image and reputation of the Applicant.

...

(vi) To hold that ... the continuation of the suspension until 11 November 1993, which was the date of expiration of his appointment, was totally arbitrary ...

...

(viii) To hold that the non-submission of the charges against the Applicant to the ad hoc Joint Disciplinary Committee, as requested by him, and addressing to him a letter of criticism, after the expiration of his appointment, was in effect a misguided arbitrary disciplinary measure devoid of the elementary principles of due process or justice.

(ix) To hold that the letter of criticism of 17 November 1993 (...) was in effect a slight modification of the letter of 9 July 1993 (...). In essence both had attributed to the Applicant one and the same accusation of misconduct. ...

(x) To order that the Secretary-General formally withdraw from the Applicant's file [the Director of Personnel, Office of Human Resources Management]'s letter of 17 November 1993 (...) which included 'an expression of the Organization's strong disapproval of this conduct on your part' and to address to him a letter informing him that the investigation had been concluded and that it had established no misconduct or irregular action on his part.

...

(xii) To order appropriate compensation to the Applicant for the injury sustained, should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case.

(xiii) In any case, to order compensation to the Applicant for the grave injury inflicted on him as a result of the arbitrary measures taken against him, ..."

Whereas the Respondent filed his answer on 2 February 1996;

Whereas the Applicant filed written observations on 14 March 1996;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, is a retired staff member of the United Nations Development Programme. He re-joined the Organization on 20 November 1988, on short-term appointments of varying duration as a Procurement Officer at the P-4 level, in the Field Missions Procurement Section (FMPS), Commercial Purchase and Transportation Service (CPTS), Office of General Services (OGS), until the expiration of his last appointment on 11 November 1993. At that time, the Applicant was a Procurement Officer at the P-4 level in OGS/CPTS/FMPS.

In 1993, a preliminary investigation was conducted into allegations of irregularities in the procurement process, especially with respect to air transportation services for field missions. By a memorandum dated 9 July 1993, the Acting Director of Personnel informed the Applicant of the allegations of misconduct brought against him and the continuing investigation, stating that a "confidential analysis" had "convey[ed] that you were instrumental in the improper award of a UN contract for air transportation services to a favoured contractor. ... In view of the seriousness of the allegations and the interest of the Organization, the Secretary-General has decided to suspend you from duty with pay under staff rule 110.2, effective immediately, without prejudice to your rights. This suspension will have a probable duration of three months." The charges of misconduct are detailed in the attachment to the 9 July 1993 memorandum. They contain, inter alia, allegations that the Applicant had not adhered to proper procurement procedures in the matter under investigation. On 13 August 1993, the Applicant denied the allegations contained in the memorandum

On 19 August 1993, the Applicant requested the Secretary-General to cancel his suspension and to restore "his hitherto unblemished status." He pointed out that he would arrange to make

all his bank accounts and related records available for inspection by the Organization in order to aid in the investigation of the allegations made against him.

On 8 September 1993, the Applicant, together with five other staff members in the same situation, submitted a statement of appeal to the Joint Appeals Board (JAB) requesting "a review of the order of suspension issued against each of them." The other applicants were subsequently referred to an ad hoc joint disciplinary committee, which recommended that no disciplinary action be taken against them. The Secretary-General, however, did not accept this recommendation, and these other staff members appealed to the Tribunal (Judgement No. 744, Eren et al. (1995)).

The JAB adopted its report on the Applicant's request for the suspension of action on 22 September 1993. It concluded as follows:

> "... the Panel felt that it had no alternative but to recommend to the Secretary-General that the request for suspension of action not be granted.
>
> ... the Panel felt that although no irreparable injury has yet been shown, an extension of the suspension beyond the three-month period, effective 9 July 1993, was likely to do so. Therefore, the Panel recommends that no such extension take place."

By a letter dated 6 October 1993, the Under-Secretary-General for Administration and Management informed the Applicant that she had accepted the JAB's recommendation that his request for suspension of action not be granted.

By a letter dated the same day, the Director of Personnel, OHRM, informed the Applicant that his suspension with pay had been extended until 11 November 1993.

On 11 October 1993, the Applicant lodged an appeal with the JAB asking for a suspension of action on the two-month extension of his suspension. The JAB adopted its report on 29 October 1993. It recommended as follows:

"... the Panel decided to recommend to the Secretary-General that the suspension of action not be granted.

...

The Panel ... was concerned at the length of the investigation and its effect on the Appellants and that it could continue indefinitely. The Panel felt that such a course of conduct would ... not be in the best interest of either the Appellants or the Administration."

On 9 November 1993, the Applicant wrote to the Director of Personnel, pointing out that his fixed-term appointment was due to expire on 11 November 1993. He expressed his desire to maintain his status as a staff member, for a "symbolic remuneration", until the final outcome of the pending investigations.

In a reply dated 17 November 1993, the Director of Personnel informed the Applicant as follows:

"Upon a thorough review of the circumstances that led to the award of contract CPTS/CON/113/92, and of your comments of 13 August 1993, I have concluded that there is no convincing evidence that your handling of this case demonstrates a pattern of favouritism towards [the company concerned]. Accordingly, I have decided to close this case.

However, the review revealed that, as the Procurement Officer in charge of this case, your treatment of vendors was insufficiently careful, resulting in a benefit to [the company concerned]. Specifically, you rejected the proposal of certain vendors because, as you stated, they 'lacked details' required in the RFP [Request for Proposal], while [another vendor's proposal], which also lacked requested details, was not rejected on the same grounds. Similarly, you conducted extensive negotiations with [that vendor], which was initially the third lowest proposer overall, and did not do so for the lowest overall proposer.

Unequal treatment of vendors is unacceptable, especially for a Procurement Officer. This letter constitutes an expression of the Organization's strong disapproval of this conduct on your part."

Thereafter, on 7 February 1994, the Applicant lodged an appeal before the JAB against the Administration's conclusion of his wrongdoing. The JAB adopted its report on 23 June 1995. Its findings, conclusions and recommendations read as follows:

> "21. The Panel, having considered the submission of the parties, concluded that the Appellant had not done anything wrong. The Panel further concluded that in spite of a supervisor's right to place on record dissatisfaction with poor performance or conduct, the second and third paragraphs of the letter from the Director of Personnel dated 17 November 1993 were unjustifiable.
>
> 22. The Panel therefore recommends that that letter should be withdrawn from the Appellant's file and replaced with one which would more accurately reflect the findings of the investigation.
>
> 23. The Panel also recommends that the Administration reconsiders the use of staff on short-term appointments in areas of work requiring a high degree of accountability."

On 16 August 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has conducted an extensive review of your case in the light of the Board's report and of all the documents and events that led to the letter of disapproval sent to you on 17 November 1993, resulting from unequal treatment of vendors in the award of contract CPTS/CON/113/92. The Secretary-General is unable to concur with the Board's findings on the burden of proof, on its weighing of the evidence and on its application of procurement rules and policies.
>
> While a distinction must be drawn between 'lowest proposer' and 'lowest acceptable proposer', determination of such acceptability must stem from technical specifications and requirements appearing in the bid solicitation. In this case, the evidence shows that the lowest bidder has been excluded without any further consultation, on the basis that it was offering less than 10 flights and proposing inadequate seating arrangements, while none of these items were specified as requirements in the initial bid solicitation.

As a result, the Secretary-General does not share the Board's views that your evaluation of bids was 'reasonable'. Nor can he accept the Board's statement that it 'was not convinced' that negotiations with the lowest proposer would have resulted in that vendor's offer meeting all critical requirements (...). This Board's supposition is conjectural, with no evidence on record to sustain it. In this case, exclusion of the lowest bidder on the basis of questionable assumptions of non-compliance was a breach of procurement rules and practices, a violation of fair and equal treatment of vendors and a conduct below the standards expected from UN procurement officers.

For the above reasons, the Secretary-General rejects the Board's recommendation and has decided that the letter of disapproval of 17 November 1993 was warranted."

On 9 October 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration's letter of disapproval dated 17 November 1993 was totally arbitrary and unsupportable by any shred of evidence involving the Applicant in any wrongdoing, and was entirely motivated by an attempt to cover up the unwarranted measures which preceded that letter.

2. Both the investigation as well as his suspension were precipitous, unwarranted and influenced by extraneous factors.

Whereas the Respondent's principal contentions are:

1. The letter of disapproval issued to the Applicant constitutes an assessment of his work performance and not a disciplinary measure.

2. The Respondent has broad discretion for determining what constitutes poor performance.

3. The investigation of the allegations against the Applicant was not improperly motivated and the Applicant's suspension was a proper exercise of the Respondent's discretion.

4. The Applicant is not entitled to compensation, since his rights were not violated by the Respondent's decision.

The Tribunal, having deliberated from 5 to 21 November 1996, now pronounces the following judgement:

I. The Applicant served with the United Nations as a permanent staff member for 34 years. He retired in 1981. Between 1988 and 1993, he held a number of short-term appointments with the Field Operations Division and Commercial Purchase and Transportation Service. On his last short-term appointment, the Applicant was employed as Procurement Officer in the Field Missions Procurement Section of the Commercial Purchase and Transportation Service. On 9 July 1993, the Acting Director of Personnel wrote to the Applicant, indicating that the Applicant had been involved in the improper award of a contract for air transportation services to a favoured contractor. The Applicant was informed that, due to the seriousness of the allegations and pursuant to staff rule 110.2, he was to be suspended from duty with pay for a duration of three months.

II. On 6 October 1993, the Applicant was informed by the Director of Personnel that the review of the matter was taking longer than expected and he was to be suspended with pay for a further two months, ending 11 November 1993. On 9 November 1993, the Applicant wrote to the Director of Personnel, noting that his appointment would expire in two days. He requested that his status as a staff member be maintained until the final outcome of the investigation. He added that he would accept a symbolic remuneration of one dollar. Concurrently, the Applicant lodged an appeal to the Joint Appeals Board (JAB) contesting the decision to extend the suspension. The JAB reported that it was "concerned at the length of the

investigation" and its detrimental effect on the Applicant. However, it did not recommend that the Applicant's request for suspension of action be granted.

By a letter dated 17 November 1993, the Director of Personnel informed the Applicant of the results and conclusions of the investigation, specifically: "that there is no convincing evidence that your handling of this demonstrates a pattern of favouritism towards ... Accordingly, I have decided to close this case".

The Applicant appeals from a decision by the Secretary-General to reject the JAB's recommendation that this letter be withdrawn from the Applicant's file and replaced with one which would "more accurately reflect the findings of the investigation".

III. The Tribunal notes that, in addition to the Applicant, other staff members of the United Nations were charged with similar wrongdoings. The staff members, however, were referred to a Joint Disciplinary Committee (JDC) which reviewed the 10 procurement cases in which they were charged with misconduct. The focus of this review was connected to the issue at hand, namely the contract granted to a certain contractor. The JDC considered all the allegations and recommended that no disciplinary measures be taken against these other staff members. However, the Under-Secretary-General for Administration and Management did not accept the JDC's recommendation. Consequently, these staff members filed an application to the Administrative Tribunal.

IV. In Judgement No. 744, Eren et al. (1995), the Tribunal concluded that the applicants were unfairly and improperly treated by the Administration when it penalized them despite the finding of their innocence by the JDC. The Tribunal rescinded the decisions of the Administration to impose disciplinary measures on the staff members and granted them $20,000 each as compensation for harm suffered.

V. Having reviewed the facts of this case, the Tribunal finds that the Respondent violated the Staff Rules and Regulations, as well as the safeguards of due process. The conduct of the Administration seems to have been the result of heavy outside political pressure and of the direct accusation by a business competitor against the contractor selected. The allegations against the staff members were primarily based on suspicion and speculation. In view of the seriousness of the accusations against the Applicant and the ensuing press releases surrounding this controversy, the United Nations should have made every effort to uphold the principle of presumption of innocence. It should have given credence to the Applicant. Had due process been respected, the Applicant would have been heard prior to any action being taken against him. Instead, the Administration presumed that the Applicant was guilty. This led to his suspension from duty and to his being unceremoniously removed from his office in front of other staff members.

VI. The Applicant found himself in an incongruous situation when his suspension was extended beyond the duration of his fixed-term appointment. The Applicant asked to have his status maintained in order to have his case referred to the JDC. However, his employment ended before he was able to plead his case before the JDC. Soon thereafter, he received the 17 November 1993 communication from the Director of Personnel. Had the Applicant been heard by the JDC, he would probably have been exonerated, as were his colleagues.

VII. The Applicant was accused of favouritism regarding Contract No. 113/92. In its report, the ad hoc JDC reviewed this contract and stated as follows:

> "332. ... The Panel therefore considered [the Applicant] to have acted properly in negotiating with [the contractor awarded the contract] after determining that [this contractor] was the lowest acceptable proposer ..."

In addition, the JAB noted that the Administration had neither alleged nor found that any guidelines or procedures had been violated by the Applicant.

VIII. The Tribunal agrees with the ad hoc JDC as well as with the JAB's conclusions. Considering that the investigation of the Applicant did not produce any convincing proof of misconduct by him, the Tribunal concludes that there is no justification for the 17 November 1993 letter to be inserted in the Applicant's file.

IX. For the foregoing reasons, the Tribunal (i) orders that the letter of 17 November 1993 be removed from the Applicant's file; and (ii) orders the Respondent to pay the Applicant the sum of $20,000 as compensation for the harm he suffered.

X All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary